

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
PETITION FOR
REHEARING
EN BANC**

77-1286

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In the Matter of the Grand Jury Subpoena
Served Upon Pedro Archuleta

BS
P70
Docket No.

PETITION FOR REHEARING
WITH SUGGESTION FOR
REHEARING EN BANC

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DIS-
TRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

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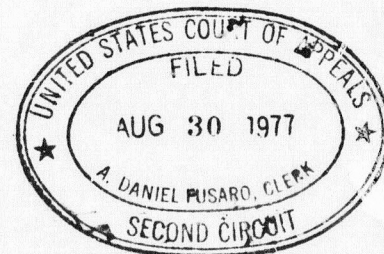


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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In the Matter of the Grand Jury
Subpoena Served Upon Pedro Archuleta

Docket No. 76-2065

PETITION FOR REHEARING
WITH SUGGESTION FOR RE-
HEARING EN BANC

Preliminary Statement

Appellant Pedro Archuleta respectfully petitions for rehearing, and suggests rehearing en banc, of the opinion of a panel of this Court [Waternman, Meskill, and Coffrin, J.J.] filed August 19, 1977, affirming an order of the United States District Court for the Southern District of New York [Owen, J.] entered June 30, 1977, holding appellant in civil contempt pursuant to 28 U.S.C. 1826.

Statement of the Case

The panel of this Court affirmed the order of civil contempt against appellant, a rural community worker from New Mexico, for his refusal to respond to four accusatory questions concerning participation, directly and tangentially, in the series of bombings attributed to the FALN. The order of affirmance was issued July 22, 1977, the day following oral argument, and the written opinion issued August 19, 1977. The panel opinion rejected what it characterized as appellant's arguments (1) that

*By order of the Court, appellant's time to petition for rehearing was extended to fourteen days after issuance of the Opinion.

the grand jury had no evidentiary basis upon which "to call him" (slip op. at 5324, attached hereto); (2) that the questions asked him were based on illegal electronic surveillance (slip op. at 5326); (3) that the composition of the grand jury discriminated against Hispanic persons (slip op. at 5329); (4) "that anything he might say in the grand jury might be disclosed by the jurors or the prosecutor, who may have 'leaked' the material already published" (slip op. at 5330); and (5) that "attacks on various federal judges and prosecutors" justified his refusal to testify (slip op. at 5330).

In the course of its holding, the panel made certain factual and legal assumptions which, in addition to erroneous characterizations of appellant's arguments, prompts the instant petition. The Court stated, "Appellant's common association with two fugitives sought by the FBI in connection with a possibly related crime, as well as the newspaper reports of his activities, were fully sufficient to justify the subpoena" (slip op. at 5323).

ARGUMENT

POINT I Appellant argued, but the panel overlooked, a distinction between the grand jury's right to call him as a witness on the basis of unfounded newspaper rumor and innuendo and their right to incarcerate him for refusal to respond to a newspaper reporter's unsupported accusations.

While appellant did not concede the right of a grand jury to subpoena witnesses on the basis of rumor and innuendo, the only issue addressed in the panel opinion, the much more serious question presented by him, the deprivation of his liberty without due process on that basis, was ignored. The issue was fully briefed in appellant's main brief on appeal, and appellant's contention rested on the Constitutional foundation of this country that liberty, property, assembly, and privacy may not be denied its citizens on the basis of unsupported accusation alone. In the context of the panel's opinion, to the extent its holding may be read to approve the incarceration of a citizen who refuses to respond to a newspaper reporter's bare accusations, albeit rephrased as questions in

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September 1, 1977

Clerk of the Court
United States Court of Appeals
for the Second Circuit
United States Courthouse
Foley Square
New York, New York

Re: In the Matter of the Subpoena
Served on Pedro Archuleta
77-1286

Dear Sir:

A sentence was omitted from the petition for rehearing filed in the above entitled case on August 30, 1977. On page 3 of the petition, the final sentence in Point I, at the fourth line from the top of the page, should read:

On the question of justification for the subpoena itself, the newspaper accusations occurred weeks after the subpoena was issued, and therefore could not have provided a basis for it.

I would appreciate your circulating this letter with the petitions; fourteen copies are enclosed. I am sorry for the error and I thank you for your assistance.

Respectfully,

Lawrence Stern

LS/sg
Enc.

cc: Thomas Engel
United States Attorney, S.D.N.Y.

a grand jury room, goes far beyond any prior holdings of this or other courts on the question of the "nexus" that must be shown between a grand jury witness and a particular investigation, and should be reconsidered at least by the panel, and preferably by the whole Court.

POINT II The government never alleged, nor is there any support in the record for the panel's factual assumption of appellant's "common association" with fugitives in the FALN investigation.

The government never alleged that appellant knew the fugitives, Carlos Torres and Oscar Lopez. The government's subpoena was directed at appellant as a one-time member of the National Commission on Hispanic Affairs of the Episcopal Church, on which the fugitives also served at an entirely different time. This is hardly any association, much less "common association." The holding of the panel can thus be read to sanction incarceration for a refusal to respond to accusatory questions put to all members of any group to whom a fugitive from unrelated charges once belonged. Again, the broad reach of such a holding and its effect on the precious Constitutional right to freedom of association, appellant submits, requires reconsideration.

POINT III The panel has misconstrued appellant's objections to the insufficiency of the government's response to his claim of illegal electronic surveillance.

On the issue of electronic surveillance, the panel has misapprehended the facts and applied the law contrary to the prevailing rule of United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974), United States v. Grusse, 515 F.2d 157 (2d Cir. 1975), and Gelbard v. United States, 408 U.S. 41 (1972).

The factual problem is easily corrected. The Court indicated, at p. 5326 of its opinion, that it understood Mr. Archuleta to be complaining of the government's failure to deny surveillance by state and local officials. This is the least of his objections to the failures to respond to his charges of illegal surveillance. His primary complaint concerns the failure of federal agencies involved in the investigation to deny surveillance in his home state of New Mexico.

In the District Court at the stage of the Motion to Quash, Judge Lasker specifically

found that Mr. Archuleta and his attorneys had raised claims of illegal surveillance, and recommended that state and local as well as federal officials in New Mexico respond to these charges. The burden remained on the government to affirm or deny surveillance under 18 U.S.C. 3504. But despite the fact that the questions asked of the witness covered a period of time from 1968 to the present and included his activities in New Mexico, no affidavit was submitted by any agent in the New Mexico field office of the FBI, or from anyone in a position to know whether that agency or the Bureau of Alcohol, Tobacco or Firearms had conducted surveillance upon the witness.

In response to Mr. Archuleta's claims of surveillance by federal, state and local agencies in New Mexico, New York and Chicago, the government submitted affidavits denying personal knowledge of surveillance on the part of U.S. Attorneys in New York and Chicago and agents of the FBI in those cities, and an affidavit from the custodian of the electronic surveillance indices in Washington, D.C., denying any record of surveillance from October 1, 1976 to spring, 1977. These responses to the claims of the witness and his counsel are inadequate on several grounds.

First, denials of electronic surveillance by the FBI are conclusive only when that is the only agency actively pursuing the investigation. This was admittedly not the case with this investigation. The letter of U.S. Attorney Robert Fiske to Judge Lasker, attached to counsel's post-argument letter of his Court documents the active involvement of the Bureau of Alcohol, Tobacco and Firearms. The government's obligation to check with all agencies involved in an investigation has been clear since United States v. Alter, 482 F.2d 1016 (9th Cir. 1973). See also, In re Tierney, 465 F.2d 806 (5th Cir. 1972), United States v. Grusse, 515 F.2d 157, at 159 (2d Cir. 1975), and In re Quinn, 525 F.2d 222, 225 (1st Cir. 1975), stating that 18 U.S.C. 3504 requires "an explicit assurance indicating that all agencies providing information relevant to the inquiry were canvassed," at 226.

Personal knowledge of surveillance (which is all that is denied by the U.S. Attorneys in Chicago and New York and the FBI agents in those cities) is irrelevant and not responsive to appellant's claims. See, e.g. In re Quinn, supra, at 225, n. 5 ("A denial of knowledge

of illegal wiretapping is obviously worth nothing if the affiant was in a position to know nothing."); In re Alfred Hodges, Jr., 524 F.2d 568 (1st Cir. 1975), explicitly rejecting the theory that the government relies on in this case by cautioning that In re Mintzer, 511 F.2d 471 (1st Cir. 1974) is not to be read as endorsing denials consisting of a prosecutor's affirmance of lack of knowledge and non-utilization of any taps in framing questions. Denials of personal knowledge, such as are relied on in this case, are "a substitute for nothing," and "an obfuscation." United States v. Vielguth, 502 F.2d 1251 (9th Cir, 1974). These "denials" are the functional equivalents of admissions.

The only denial which even purports to be factual and from a person in a position to know of the existence of surveillance is that of Agent Smythe, custodian of the national indices of electronic surveillance in Washington, D.C. His denial covers a period of only several months out of a nine-year period covered by the questions asked before the grand jury and asserted by the witness as the period during which illegal surveillance may have occurred. Such a denial clearly does not eliminate the possibility of surveillance, or even begin to respond to the bulk of the claims raised by the witness.

Because of the unanswered claims of surveillance in New Mexico by the FBI, BATF, state and local agencies known to be involved in the investigations in New York and Chicago, Mr. Archuleta now stands in precisely the same position as Sister Jogues Egan, who was released from custody after being held in civil contempt for refusing to testify without a response from the government to her claims of illegal surveillance. In her case the government maintained that 18 U.S.C. 3504 did not apply to grand jury proceedings, and refused to deny or affirm the existence of illegal surveillance directed against her. In re Grand Jury Proceedings /Egan/, 450 F.2d 217 (3rd Cir. 1971), aff'd sub nom. United States v. Gelbard, 408 U.S. 41. In Gelbard, the government made its first effort to deny surveillance in the United States Supreme Court, and was told by that Court that failure to respond to an allegation of surveillance would be construed as an admission. Id. at 46, 47

The Gelbard rule with respect to the penalty for "declining" to respond to a specific allegation of surveillance was applied by the Fifth Circuit in Beverly v. United States, 468 F.2d 732, 750 (1972), when a contempt was vacated for failure to deny surveillance upon a single telephone number at a residence at which one of the attorneys for the witness was temporarily staying.

As for the panel's reliance on the dictum in United States v. Yanagita, 552 F.2d 940 (2d Cir. 1977) to circumvent the plain meaning of 18 U.S.C. 3504 and a long line of cases construing it, appellant urges a careful reconsideration. The case relied upon arose as a criminal contempt committed in the course of a trial. Claims of illegal electronic surveillance were not filed until the day of trial, whereas here the government had close to eight weeks to search its records without disrupting an ongoing grand jury investigation. Furthermore, the opinion in Yanagita itself suggests that the government will be held to a higher standard in responding to electronic surveillance claims by a grand jury witness. 552 F.2d at 944 (government held to a "high standard of completeness" in responding to charges of surveillance by a grand jury witness).

The panel's reliance on the cited language from United States v. Grusse, 515 F.2d 157 (2d Cir. 1975) is misplaced. That language does suggest that certification from a U.S. Attorney that s/he has not used the fruits of electronic surveillance in the formulation of any grand jury question would lay to rest the issue of electronic surveillance. That practice has been specifically rejected by other courts (See, especially In re Alfred Hodges, Jr., supra, and cases discussed at p. 5 of this brief), and was neither the practice followed by the U.S. Attorney in Grusse nor the majority opinion on the proper procedure for responding to electronic surveillance claims. The majority in Grusse relied heavily on the findings and careful balancing of competing interests done by Judge Jon Newman at the district level. In fact, in Grusse there was a finding that the FBI was the only agency involved in the investigation, and the government was ordered to make unequivocal first-person denials of surveillance by a person in a position to know whether it had occurred. Finally, the denials were subjected to cross-examination.

See, In re Grusse, 402 F.Supp. 1232 and In re Turgeon, 402 F.Supp. 1239, both opinions by Newman, J., D.Conn. 1975).

One Court recently declared that "it is clear from the plain meaning of" 18 U.S.C. 3504 "that the government's response should go to the existence of the unlawful activity," and not to the prosecutor's lack of awareness. United States v. Weiner, 418 F.Supp. 941 at 947 (M.D.Pa. 1976), citing United States v. Testa, 486 F.2d 1013, 1016 (3rd Cir. 1973). It is clear that under almost any interpretation of 18 U.S.C. 3504, and certainly under Gelbard, supra, the government has not met its burden in this case, and is in the position of having admitted surveillance by failing to respond in any meaningful way with respect to at least one federal agency known to be involved in the investigation, and for the vast majority of the time period covered by the witness' claims.

POINT IV Appellant's arguments to this and the lower courts concerning his challenge to the composition of the grand jury did not, contrary to the panel's characterization, rest on a full attack, but rather on his right to access to the jury data in order to make that challenge.

There is no way appellant could make a full composition challenge without access to the jury data, and the Supreme Court has so held. Test v. United States, 420 U.S. 28 (1975). It was the right of access, under both the Constitution and 28 U.S.C. 1861 which appellant presented as the threshold question, and which the panel did not decide.

POINT V The government's apparently superficial investigation of leaks in the Southern District, a fact discovered and presented to the Court after oral argument in this case, but before the panel's opinion issued, should be considered.

The panel assumed, "the Department of Justice is now investigating those disclosures. We assume that they will take appropriate measures against those responsible." (Slip op. 5330 n. 8). However, the assumption appears to be belied by the letter of the Hon.

*Appellant did not concede absence of standing under the statute (see main brief at pp. 60-61), contrary to the panel's statement of his argument (slip op. at 5329 n.7).

*

Robert Fiske , United States Attorney for the District, who, pursuant to Judge Lasker's order, conducted an investigation in this District of the leaks that resulted in the New York Times article. As argued in counsel's letter to the panel of July 22, the in camera affidavits of selected FBI and ATF agents merely attest that these agents did not give information to Mary Breasted of the New York Times. The Court should review these affidavits, for if that is all they say, the investigation is deficient in that denials of leaks to anyone else are avoided.

POINT VI For the record, appellant has not and does not "attack . . various federal judges and prosecutors" (slip op. at 5330); he attacks procedures which he argues are contrary to legal precedent and the Constitution.

Appellant's arguments herein, in his main brief, and before the panel, have never been intended to attack personalities or sepcific individuals. His arguments are against the procedures which have been misused to jail him for political and religious associations and a newspaper reporter's accusations, all of which were used to suddenly divest him of his Constitutional privilege against self-incrimination. Those arguments, disagreement notwithstanding, are founded in law and the Constitution, not personalities; any other reading of his claims is an unfortunate subjective interpretation which is not intended.

CONCLUSION

REHEARING AND REHEARING EN BANC SHOULD
BE ORDERED AND THE ORDER BELOW REVERSED.

Respectfully submitted,

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Submitted to the panel upon its discovery the day following oral argument; it had not been made known to appellant until a footnoted reference to it appeared in the government's brief.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1547—September Term, 1976.

(Argued July 21, 1977

Decided July 22, 1977,
Opinion August 19, 1977.)

Docket No. 77-1286

IN THE MATTER OF THE GRAND JURY
SUBPOENA SERVED UPON
PEDRO ARCHULETA

Before:

WATERMAN and MESKILL, *Circuit Judges*,
and COFFRIN, *District Judge*.*

Appeal from a judgment of civil contempt in the Southern District of New York, Owen, J., for refusing without just cause to answer questions before a grand jury.

Affirmed.

LAWRENCE STERN, Brooklyn, New York (Linda Backiel, Joan Friedland, Brooklyn, New York, of counsel), *for Appellant Archuleta*.

THOMAS E. ENGEL, Assistant United States Attorney, Southern District of New York (Robert B. Fiske, Jr., United States Attorney, Frederick T. Davis, Assistant United

* Hon. Albert W. Coffrin of the District of Vermont, sitting by designation.

States Attorney, Southern District of New York, of counsel), for the United States of America.

MESKILL, *Circuit Judge*:

Pedro Archuleta, the appellant here, was found to be in civil contempt for refusing to answer questions put to him by a grand jury empanelled in the Southern District of New York. The order of contempt, issued by Judge Owen, remanded Archuleta until he purged himself of his contempt or until the term of the grand jury expires. 28 U.S.C. § 1826(a). Because of the time limitation of 28 U.S.C. § 1826(b), we affirmed the order of the district court on July 22, 1977;¹ this opinion explains the basis of our decision.

On January 24, 1975, a bomb exploded in Fraunces Tavern, a restaurant in New York City. Four people were killed, and fifty-three were injured. A group known as Fuerzas Armadas de Liberacion Nacional Puertorriquena, or "FALN," which seeks independence for Puerto Rico, claimed responsibility for this act of terrorism. A number of subsequent bombings have been traced to the FALN.

In April, 1975, a grand jury was empanelled in the Southern District of New York to investigate these bombings. The term of that grand jury expired in October, 1976. A second grand jury, empanelled to investigate the same crimes, is now sitting.

In November, 1976, a "bomb factory" was discovered in an apartment in Chicago, owned by one Carlos Torres. Evidence was found there linking Torres, who is now a

1. 28 U.S.C. § 1826(b) provides:

Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal.

fugitive, to the FALN. Searchers also found a letter from a church in San Antonio, Texas, to Maria Cueto, the Executive Director of The National Commission on Hispanic Affairs of The Protestant Episcopal Church. Miss Cueto and her secretary, Raisa Nemikin were called before the grand jury, and refused to testify concerning the whereabouts of Torres, after being ordered to do so. *See In re Wood*, 430 F.Supp. 41 (S.D.N.Y. 1977). They were held in civil contempt by the district court, and were remanded until they testified. This Court affirmed the judgment of contempt, *In re Cueto*, 554 F.2d 14 (2d Cir. 1977), and they are presently incarcerated.

Shortly after our decision in *Cueto, supra*, a grand jury subpoena was served upon the appellant. He had been a member of The National Commission on Hispanic Affairs; he had also been named in various newspaper accounts as a possible supplier of dynamite to the FALN. Motions to quash the subpoena were denied by Judge Lasker. Before the grand jury, he was asked the following questions:

- (1) Did you provide dynamite to anyone you knew to be in a group called the FALN at any time prior to January 24, 1975?
- (2) Do you know the source of dynamite explosives used at the bombing of Fraunces Tavern?
- (3) Do you know anyone who is responsible for the bombing at Fraunces Tavern?
- (4) In early 1968 did you yourself steal any dynamite from the Heron Dam Project site near Parkview, New Mexico?

Archuleta invoked his Fifth Amendment immunity, and refused to testify. The prosecution then applied for, and obtained, from Judge Brieant, an order of immunity.

Judge Brieant also entered a protective order designed to avoid public disclosure of the grand jury proceedings.

Thereafter, Archuleta refused a second time to answer these four questions. After the foreman had expressly directed him to answer, the questions were asked a third time. Rather than responding, appellant made a series of political speeches explaining his refusal to testify. After polling the jury to determine that they all felt the questions to be "reasonably necessary and proper," Judge Brieant directed appellant to testify. When Archuleta persisted in his contumacious conduct, he was held in contempt on June 30, 1977, by Judge Richard Owen, and remanded, pursuant to 28 U.S.C. § 1826.

I.

Appellant's first contention is that the grand jury had no evidentiary basis upon which to call him. In *Blair v. United States*, 250 U.S. 273 (1919), it was stated that a witness before a grand jury is:

bound not only to attend but to tell what he knows in answer to questions framed for the purpose of bringing out the truth of the matter under inquiry.

He is not entitled to urge objections of incompetency or irrelevancy, such as a party might raise, for this is no concern of his.

Id. at 282. This has continued to be the rule. Recently, Judge Friendly explained:

The safeguards built into the grand jury system, such as enforced secrecy and use of court process rather than the constable's intruding hand as a means of gathering evidence, severely limit the intrusions into personal security which are likely to occur outside the grand jury process. To be sure, on occasion, a grand

jury may overstep bounds of propriety either at its own or the prosecutor's instance, and conduct an investigation so sweeping in scope and indiscriminating in character as to offend other basic constitutional precepts. When this occurs courts are not without power to act Apart from such cases, when the grand jury has engaged in neither a seizure nor a search, there is no justification for a court's imposing even so apparently modest a requirement as a showing of "reasonableness"—with the delay in the functioning of the grand jury which that would inevitably entail.

United States v. Doe (Schwartz), 457 F.2d 895 (2d Cir. 1972), cert. denied, 410 U.S. 941 (1973). See *Branzburg v. Hayes*, 408 U.S. 665, 701-02 (1972); *Hale v. Henkel*, 201 U.S. 43, 65 (1906).

The actions of the grand jury here are clearly justified. The questions asked of Archuleta were narrowly focused on criminal conduct which had occurred in the Southern District. His common association with two fugitives sought by the FBI in connection with a possibly related crime,² as well as the newspaper reports of his activities, were fully sufficient to justify the subpoena. See *Branzburg v. Hayes*, *supra*, at 701-02; *Costello v. United States*, 350 U.S. 359, 362-63 (1956). Archuleta's attempt to evade his duty as a citizen on this ground is without merit.³

2 Arrest warrants for Torres and Oscar Lopez, charging possession of explosives and unlawful flight, have been issued in Chicago.

Archuleta now complains that he was never asked a question about the whereabouts of Torres. It ill becomes a witness who contumaciously refused to testify to claim a deprivation of rights based on the grand jury's failure to question him further.

3 Archuleta also appears to claim that this grand jury is not interested in finding the bombers responsible for four deaths, but is merely persecuting him and those who share his political views. There being no evidence to support this contention, we consider it groundless.

II.

Archuleta's second claim is that the questions asked him in the grand jury were based on illegal electronic surveillance, and thus that the contempt order must be vacated under *Gelbard v. United States*, 408 U.S. 41 (1972). This claim is also without merit.

The appellant made sweeping allegations of illegal wire-tapping before the district court. The evidence marshalled in support of this was a recitation of difficulties in completing calls, together with strange noises heard on completed calls. There was also an affidavit, from one Mary Lujan, stating that she had been asked by FBI agents if she had telephoned Archuleta.

In response, the government produced affidavits from the Assistant United States Attorney and FBI agents in charge of the investigation of FALN bombings in New York. These affiants stated that they were unaware of any illegal electronic surveillance of Archuleta. A similar set of affidavits was submitted from federal authorities in Chicago, where an investigation into related crimes is underway. Finally, the prosecutor submitted an affidavit from the person in charge of the records of electronic surveillance maintained by the FBI in Washington stating that a search of those records revealed no electronic surveillance of appellant. The appellant now challenges this response as inadequate and argues that searches of state and local records in New Mexico, Illinois and New York were required before he could be held in contempt.

We doubt whether the appellant has made even the preliminary showing necessary to require the government to respond to his claim of illegal electronic surveillance. Some mechanical troubles with a telephone, together with knowledge of a call easily derived from long distance tele-

phone records,⁴ is such insubstantial evidence that in most cases it puts no burden on the prosecutor to "affirm or deny" the existence of wiretapping. See *In re Grand Jury (Vigil)*, 524 F.2d 209, 214 (10th Cir. 1975), cert. denied, 425 U.S. 927 (1976).

However, if, as the district court held, the showing made was sufficient to trigger a governmental response, the answer of the prosecutor was sufficient. As we recently explained in *United States v. Yanagita*, 552 F.2d 940 (2d Cir. 1977):

But even in a grand jury proceeding, upon the government's production of a valid warrant the witness has been held not to be entitled to a full-blown hearing on the legality of the warrant prior to testifying since "the traditional notion that the functioning of the grand jury system should not be impeded or interrupted could prevail at that time over the witness' interest" *In re Persico*, 491 F.2d 1156, 1160 (2d Cir. 1974). See also *Gelbard v. United States*, supra, 408 U.S. at 70, 92 S.Ct. 2357 (White, J., concurring).

Similarly, where the questions asked of a grand jury witness are narrow in scope, an affidavit by the Assistant United States Attorney in charge of the grand jury proceeding, as distinguished from an all-agency search, will suffice, since he would know if his questions were derived from illegal surveillance.

"It must be remembered that any electronic surveillance by the government is relevant only if it is somehow used in formulating questions that the grand jury intends to ask. Thus, surveillance conducted by the government, the results of which were not known to the agents investigating this case,

⁴ There is no claim that the FBI knew of the contents of the call.

would not be relevant. . . . I think that the assistant United States attorney handling a case and the FBI agent in charge of the investigation of a case are the two people most likely to know if the fruits of any electronic surveillance were used to gain information on which the grand jury would base its questions. Thus, I think that the denial was sufficient." *United States v. Grusse*, 515 F.2d 157, 159 (2d Cir. 1975) (Lumbard, J., concurring).

In addition, the duty of the government to respond under § 3504 may vary with the specificity of the claims raised by the witness. *United States v. See*, 505 F.2d 845, 856 (9th Cir. 1974), *cert. denied*, 420 U.S. 992, 95 S.Ct. 1428, 43 L.Ed. 2d 673 (1975); *United States v. Stevens*, 510 F.2d 1101 (5th Cir. 1975).

Id. at 944. See *Gelbard v. United States*, 408 U.S. 41, 71 (1972) (White, J., concurring). ("Of course, where the Government officially denies the fact of electronic surveillance of the witness, the matter is at an end and the witness must answer.") The standard set out in *Yanagita* was fully complied with. The questions put to Archuleta were narrowly focused on specific criminal activity. It was thus relatively simple for the prosecutor to determine the evidentiary basis for the questions. In response to vague, sweeping charges of wiretapping, the government responded with specific, factual denials of illegal conduct. *Gelbard* requires no more.⁵

⁵ After oral argument, Archuleta's counsel submitted a letter to the Court alleging that the Bureau of Alcohol, Tobacco and Firearms ("ATF") was also investigating the FALN. He now demands that appellant be released until an affidavit is secured from ATF denying any illegal electronic surveillance.

Assuming, *arguendo*, that ATF has actively investigated this case, our decision is not affected. *Gelbard* and *Yanagita* focus the investigation of "taint" on the particular questions put to the witness. Here,

III.

Archuleta has also challenged the racial and ethnic composition of the grand jury.⁶ All parties agree that this grand jury was selected by procedures which complied with the Jury Selection and Service Act of 1968, 28 U.S.C. § 1861 *et seq.* The vague, conclusory allegations of underrepresentation of Hispanics made by Archuleta do not even make out a colorable claim of a constitutional violation, let alone a substantial and prejudicial exclusion of minority jurors. Absent such a showing, this jury, selected in accordance with a valid law, is not subject to attack.⁷ *United States v. Bennet*, 539 F.2d 45, 55 (10th Cir. 1976), *cert. denied*, — U.S. — (197—).

the Assistant United States Attorney, who knows the source of his own questions, denied any knowledge of electronic surveillance. This meets the requirements of *Gelbard* and *Yanagita* in this case.

6 Archuleta made the same challenge when called before a grand jury in the Northern District of Illinois. The district court there rejected the challenge on the merits.

7 The appellant concedes that he has no statutory standing to mount this challenge under 28 U.S.C. § 1867. He relies exclusively on his constitutional challenge. The government vigorously urges that Archuleta lacks any standing to raise this claim. *In re Maury Santiago*, 533 F.2d 727 (1st Cir. 1976), so held, citing *United States v. Duncan*, 456 F.2d 1401, 1403-04 (9th Cir.), *vacated for reconsideration of other matters*, 409 U.S. 814 (1972). See *Blair v. United States*, 250 U.S. 273, 282 (1919).

However, in *United States ex rel. Chestnut v. Criminal Court*, 442 F.2d 611 (2d Cir.), *cert. denied*, 404 U.S. 856 (1971), relied on by Archuleta, a footnote indicated that a witness before a state grand jury had standing to challenge its composition. *Id.* at 615 n.7. However, that grand jury had the power to institute criminal contempt charges, which it had done. Here, by contrast, we are dealing with a civil contempt initiated by the United States Attorney. The *Chestnut* court focused on these powers of the grand jury, which are unavailable in federal practice. While we do not decide the issue, the footnote in *Chestnut* appears to be a weak reed for any future challenge by a witness to the grand jury array. Moreover, *Chestnut* resolved the substantive issue against the contemnor on the ground that the jury selection procedure was fair, and created no prejudice, even if some groups were under-represented.

IV.

Archuleta's final point of any substance is a claim that his conduct is justified because of newspaper stories concerning the FALN, which have appeared during the investigation of the bombings. Apparently, his theory is that anything he might say in the grand jury might be disclosed by the jurors or the prosecutor, who may have "leaked" the material already published.⁸ His ostensible concern is that some of this testimony would thus reach the Chicago grand jurors who are also investigating FALN bombings. Archuleta is a "target" of that grand jury investigation.

It is self-evident that no breach of grand jury secrecy concerning Archuleta has occurred to date, since he has refused to answer any questions. The government has supplied affidavits denying that any breach of grand jury secrecy was the basis for the articles mentioned. Nor is there any reason to believe that the jurors or the prosecutor will violate their oaths, and invade the secrecy of the proceedings. Appellant's speculation does not provide a justification for his contumacious conduct. If such violations do occur, the district court has adequate powers to remedy the situation.

The remainder of Archuleta's many claims, consisting largely of wholly unwarranted attacks on various federal judges and prosecutors, are not worthy of discussion. The judgment of civil contempt is affirmed.

⁸ The Department of Justice is now investigating those disclosures. We assume that they will take appropriate measures against those responsible.

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